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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. BRADLEY JUDGE BOONE, Defendant and Appellant.	C058832 (Super. Ct. No. 62-68172A)

After a jury trial defendant Bradley Judge Boone was convicted of possession of cocaine (Health & Saf. Code, § 11350, subd. (a)) and possession of paraphernalia used for unlawfully injecting or smoking a controlled substance (*id.*, § 11364). Defendant appeals from an ensuing order granting probation.

Defendant contends that the trial court erred prejudicially: (1) in denying his motion for discovery of personnel records of the arresting officers under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; and (2) in overruling an objection to admission of evidence of a police officer's opinion whether the evidence the police collected was "sufficient for both possession and for paraphernalia." Finding no merit in the

contentions of error, we shall affirm the judgment (order of probation).

FACTUAL AND PROCEDURAL BACKGROUND

Officer Michael Easter of the Roseville Police Department testified as follows. He was summoned to the Orchid Suites hotel on March 7, 2007, by the management when they were unable to awaken defendant, who was overdue to check out. He found defendant lying on the bed snoring. On the floor beside him were a spoon, a hypodermic needle, and a shortened straw (commonly used as a device for snorting drugs). The spoon contained a white powder residue and had brown burn marks on the bottom.

Officer Easter awakened defendant, placed him under arrest, and gave him a *Miranda*[1] admonition. A white hat was sitting on the counter on the sink. Defendant affirmed that it was his baseball cap. Underneath were a plastic CD case and a Walmart gift card, both with white powder residue. Easter opined that the items had been used to prepare cocaine for snorting. Easter found cocaine in a small container on a table in the living room of the suite.

Defendant asked to take a small bag with him. It contained items including additional small containers and baggies with white powder residue and another shortened straw. A third

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

shortened straw with white powder residue was found in defendant's pants pocket.

On cross-examination Officer Easter was pressed about other investigative measures, e.g., fingerprints and blood tests he might have taken to provide additional proof that the cocaine and paraphernalia were possessed by defendant and not others who might have used the hotel room. On redirect examination he testified, inter alia, that it was not cost effective to do extensive testing in "a drug possession case." On recross-examination he was again questioned about not testing defendant to see if he was under the influence of cocaine or obtaining fingerprint evidence. During the second redirect examination the prosecutor elicited that there were often potential additional tests or investigative measures that could be taken and that Officer Easter made judgments based on all the facts in each case about what investigation and testing to pursue. The prosecutor further elicited that, based on the information he had, including defendant's admissions, he saw no need to do additional tests in this case. Thereafter, the following exchange ensued:

"[PROSECUTOR]: So in your opinion, the evidence in this case is sufficient for both possession and for paraphernalia. Is that correct?

"[OFFICER EASTER]: Yes.

"[DEFENSE COUNSEL]: Objection. This officer's not the judge of the sufficiency of the evidence.

"THE COURT: I'll explain my ruling on that. In earlier decades, there was an objection about allowing the witness to testify about an ultimate issue in a case. The case law has said that that's no longer a valid reason for excluding the evidence. If it's--it's an opinion testimony, just like anything else. [¶] So overruled."

Tito Andrada, a criminalist expert in toxicology, testified that the residue on the spoon, the CD case and Walmart card, the powder in the first collected small container, a short straw, and the containers and baggies from the small bag all tested positive for cocaine. He also testified that the cocaine in three of the containers was a usable amount.

Alfred Shephard had rented the room in which defendant was found. Officers found Shephard in a nearby room in possession of additional cocaine. The parties stipulated that Shephard had "already pled guilty to possession of a controlled substance." When defendant was shown the cocaine found with Shephard he denied possession of it. However, he admitted to the officers that he had possessed and used cocaine in his room the prior evening.

Defendant testified in his own defense, in essence as follows. He denied use of or possession of the cocaine. Shephard and others were in the room on the night before his arrest. When defendant went to bed he had not seen the CD case and Walmart card on the sink; the spoon and needle were not on the floor next to his bed; he is a diabetic and used a needle to

administer insulin; and he did not see or put any cocaine in the containers. He denied making the admissions to the officers that he had possessed cocaine.

DISCUSSION

I

Defendant contends, arguendo, that the trial court erred in denying his *Pitchess* motion to discover any information in the personnel records of Officer Easter and another officer who testified that he admitted possessing cocaine, for complaints or other records pertaining to acts indicating dishonesty, false arrest, fabrication of charges, statements, or evidence. The trial court reviewed material produced in response to the motion and declared that there was nothing subject to *Pitchess* disclosure. Defendant requests that this court review the record of the in camera proceedings concerning the trial court's review of the *Pitchess* materials, pursuant to the procedure laid out in *People v. Mooc* (2001) 26 Cal.4th 1216, 1229 (*Mooc*).

Mooc instructs that when a *Pitchess* motion shows good cause for discovery the custodian of records must bring all potentially relevant documents to the court for in camera review and be prepared to justify to the court why any other records were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion. *Mooc* provides the following review procedure of *Pitchess* materials.

"The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion.

Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent. Of course, to protect the officer's privacy, the examination of documents and questioning of the custodian should be done in camera in accordance with the requirements of Evidence Code section 915, and the transcript of the in camera hearing and all copies of the documents should be sealed." (*Mooc*, *supra*, 26 Cal.4th at p. 1229.)

We have reviewed the sealed record of the in camera proceedings in this case. The record complies with the requirements of *Mooc* and there is no arguable basis for a claim of error by the trial court in its ruling that there is no material subject to *Pitchess* disclosure.

II

Defendant contends that the trial court erred prejudicially in overruling his objection to the question asking for Officer Easter's opinion on whether the evidence in this case is "sufficient for both [charged offenses]." Defendant argues that the trial court erred because the officer was allowed to opine that the evidence was sufficient to convict. Citing Evidence

Code section 805 defendant concedes that the court was correct that opinion evidence is no longer inadmissible on the ground that it embraces an ultimate issue to be decided by the trier of fact. However, he submits that sufficiency of the evidence for conviction is a question of law for the court and, hence, expert opinion testimony was inadmissible under cases such as *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1181-1183.

The Attorney General concedes the question was inappropriate and commendably draws our attention to the following passage in *People v. Torres* (1995) 33 Cal.App.4th 37, 46-47: "A consistent line of authority in California as well as other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant. (*People v. Brown* (1981) 116 Cal.App.3d 820, 829; *People v. Clay* [(1964)] 227 Cal.App.2d [87,] 98-99, citing cases.) As explained in *Brown* and *Clay* the reason for employing this rule is not because guilt is the 'ultimate issue of fact' to be decided by the jury. Opinion testimony often goes to the ultimate issue in the case. (See *Brown*, *supra*, 116 Cal.App.3d at pp. 827-828, and cases cited.) Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt."

Our review of a claim of prejudicial error of this nature is governed by Evidence Code section 353.[2] The first requirement is an objection to the evidence making clear the specific ground for exclusion. The objection made was that the witness was not "the judge of the sufficiency of the evidence." The court took this as an objection that the answer should be excluded because it invaded the province of the jury and correctly declared the law that such an objection was invalid.

The specific ground for objection tendered by defendant on appeal is that the answer should be excluded because it invaded the province of the judge. That is to say, the witness was being asked to render an opinion on a question of law, whether the evidence adduced was sufficient to sustain a conviction on appeal or to survive a motion for acquittal (Pen. Code, § 1118.1), which is solely within the province of the court. However, the objection at trial was not stated so as to make clear that specific ground of the objection.

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[2] Evidence Code section 353 is as follows:

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

"(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

"(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

The purpose of the requirement that the specific grounds of the objection be stated is to bring it to the attention of the court and opposing parties, so that erroneous admission could be avoided. Thus it is a variety of the doctrine of theory of trial--matters not raised that could have been cured cannot be tendered for the first time on appeal. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 407, p. 466.) When the defense acquiesced without comment in the court's characterization of the objection, it lost the right to claim that the ground for the objection was other than that the testimony would invade the province of the jury.

The same analysis applies to the specific ground of objection suggested by the Attorney General. That ground is that the matter is not an appropriate topic for opinion testimony, as it is not a subject on which an opinion of the witness would be helpful to the trier of fact. (See Evid. Code, §§ 800-803.) For the reasons already given, this ground too was not stated so as to make clear this specific ground of objection. Accordingly, neither ground, as stated, is tenable as a basis for reversal and the contention of prejudicial error is not meritorious.

To forestall an ill-advised petition for habeas corpus relief predicated on a claim of ineffective assistance of counsel, we note that all of the aforementioned grounds associated with the objection are inapt. Viewed in context, and most importantly from the vantage point of the lay jurors, the

question would not elicit an opinion on the "sufficiency of the evidence" in the technical, lawyer's sense of being sufficient to warrant or sustain a conviction or to defeat a motion for acquittal. As the Attorney General notes, the opinion on sufficiency that was actually being elicited was investigative sufficiency: whether the officers should have gathered additional evidence or conducted further tests in light of defendant's claims, at trial, that he did not use cocaine and that it and the paraphernalia were only possessed by others who were in the hotel room, without his knowledge or participation. As the defense had already questioned the officer about the issue, in a tactical maneuver to discredit the officers, the question was unobjectionable.

Moreover, to the extent that the form of the question might have been objectionable because the answer could have been mistaken as an opinion on the sufficiency of the evidence, or of defendant's guilt, we would deem error in overruling the objection harmless. The evidence that defendant possessed the cocaine found in his personal effects was very strong. His claim that others had strewn it throughout the suite, under his hat, and in his pants and bag, without his knowledge, lacks verisimilitude. Regardless of the question, the jurors would have inferred Officer Easter believed that defendant was guilty, in view of his testimony that defendant had admitted to him that he had used cocaine on the prior evening. After an examination of the entire cause, including the evidence, it is not

reasonably probable that a result more favorable to defendant would have been reached in the absence of such error. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment (order of probation) is affirmed.

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.